No. 90-5854-CFX
Status: DECIDED

Title: Robert H. Young, Petitioner
v.
Phyllis Kenny, et al.

Docketed:
September 24, 1990

Court: United States Court of Appeals
for the Ninth Circuit

See also:
90-5672

Counsel for petitioner: Wiebe,Richard R.

Counsel for respondent: Owada,Aaron

Entry	Date	Note	Proceedings and Orders
1	Sep 24 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 1 1990		DISTRIBUTED. November 21, 1990
4	Nov 20 1990	F	Response requested -- BRW.
5	Dec 21 1990		Brief of respondents Phyllis Kenny, et al. (PRINTED-9 copies) in opposition filed.
6	Jan 3 1991		REDISTRIBUTED. January 18, 1991
7	Jan 4 1991	X	Reply brief of petitioner Robert Young filed.
9	Feb 1 1991		REDISTRIBUTED. February 15, 1991
11	Feb 15 1991		REDISTRIBUTED. February 22, 1991
13	Feb 25 1991		Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

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No. ORIGINAL 90-5854

In The

Supreme Court of the United States

October Term, 1990

ROBERT H. YOUNG,

Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING, and HENRY ROSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should the Court impose the habeas corpus exhaustion-of-state-remedies requirement as a prerequisite to a state prisoner bringing a 42 U.S.C. § 1983 action for money damages against state employees in their personal capacities for the denial of sentence credits?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert H. Young petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of the petition for rehearing, is reported at 907 F.2d 874. App. A. The court of appeals' initial opinion was published at 887 F.2d 237. The United States District Court's order is unreported. App. C.

JURISDICTION

The court of appeals' amended opinion and order denying rehearing were filed and entered June 25, 1990. App. A. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42 U.S.C. § 1983 is reprinted at App. D.

STATEMENT

Petitioner Robert H. Young has been incarcerated, paroled, and then reincarcerated in the prisons of Washington State on the same sentence. He filed this pro se 42 U.S.C. § 1983 action alleging that, during his first period of incarceration, he was denied jail-time credits for time served before his conviction, thus delaying the date on which he was paroled from that initial incarceration. CR 1, 9a. Young seeks damages for this deprivation.

Petitioner Young brought this action against respondents Kenny, Manning, and Rose. Although the respondents are Washington State officials, petitioner has sued them in their personal capacities. The district court's jurisdiction over Young's complaint rested on 28 U.S.C. §§ 1331, 1343.

The respondents concede that Young's sentence was not credited with his jail time before he was paroled and was not so credited until after this action was filed. CR 20 (Defendants' Memorandum in Support of Motion to Dismiss) at 2-3 and Exs. 5, 7, 10.[1/] The magistrate to whom the case was assigned sua sponte raised the issue of

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[1/] Citations to the district court clerk's record are given as "CR __."

whether Young must exhaust state remedies before bringing his claim and directed the parties to brief the issue. CR 21. The district court, adopting the magistrate's recommendation (App. B), then dismissed the action for failure to exhaust state remedies (App. C).

On appeal, the United States Court of Appeals for the Ninth Circuit held that Young was required to exhaust his state remedies before pursuing his section 1983 action, but modified the district court's judgment to stay rather than dismiss the action. App. A. As the Ninth Circuit acknowledged, its holding may delay for years Young's opportunity to proceed on his section 1983 damages claim. *Id.* at 9a.

REASONS FOR GRANTING THE WRIT

A. The Section 1983 Exhaustion Requirement Imposed By The Ninth Circuit Is Contrary To Congress' Intent And The Court's Decisions

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court recognized that Congress, in establishing the mutually exclusive statutory schemes of section 1983 and federal habeas corpus, has limited the exhaustion-of-state-remedies requirement to habeas corpus claims only. In *Wolff*, the Court expressly held that prisoner section 1983 actions seeking damages for the denial of sentence credits may go forward without exhaustion, *Wolff*, 418 U.S. at 554-55, in accordance with the general principle that exhaustion is never required before bringing a section 1983 action. The Ninth Circuit in this case acted contrary to these decisions by imposing a habeas corpus exhaustion-of-state-remedies requirement on state prisoner section 1983 actions challenging the fact or duration of confinement but seeking only damages.

In *Preiser*, the Court held that the federal habeas corpus statute, 28 U.S.C. § 2254, is the exclusive remedy for a state prisoner both challenging the fact or duration of confinement *and* seeking immediate or speedier release. *Preiser*, 411 U.S. at 489-90, 500. Such claims are outside the scope of section 1983. *Id.* As habeas corpus claims, they are subject to the exhaustion requirement mandated by Congress in 28 U.S.C. § 2254(b). *Id.* at 477, 489.

Preiser repeatedly limited its definition of habeas corpus claims, and the coextensive requirement of exhaustion, to claims where both 1) the prisoner challenges the fact or duration of confinement and 2) the relief sought is immediate or speedier release. *Id.* at 489, 494, 498, 499 n. 14, 500. *Preiser* expressly excluded section 1983 damages claims from any exhaustion requirement. *Id.* at 494. "In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, . . . a damage action by a state prisoner could be brought under [section 1983] in federal court without any requirement of prior exhaustion of state remedies." *Id.* (emphasis in original).

In *Wolff*, the Court applied *Preiser* to prisoner claims alleging the unconstitutional deprivation of good-time credits and seeking both restoration of the good-time credits and damages. *Wolff*, 418 U.S. at 554-55. *Wolff* adhered to *Preiser's* differentiation between relief that shortens the term of confinement and other forms of relief, such as damages or declaratory relief, as the boundary between habeas corpus claims that must be exhausted and section 1983 claims that need not be exhausted. *Id.* The Court held that, while the request for restoration of good-time credits could only be brought as a habeas corpus claim, the request for damages for the erroneous deprivation

of credits was properly brought under section 1983 and could go forward without exhaustion, even though it would require a "determination of the validity of the procedures employed for imposing sanctions, including loss of good time." *Id.* "Under [*Preiser*] only an injunction restoring good time improperly taken is foreclosed." *Id.* at 555.

Preiser and *Wolff* are reflections of the general principle, consistently held by this Court, that exhaustion of state remedies is never required before bringing a section 1983 claim in federal court. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 516 (1982) (rejecting exhaustion requirement because, in enacting section 1983, "Congress assigned to the federal courts a paramount role in protecting constitutional rights," *id.* at 503); *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974); *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). As the Court made clear in *Patsy*, it is Congress' intent that forbids an exhaustion requirement for section 1983 claims: "[W]hether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy*, 457 U.S. at 501-02; *see also id.* at 513.

The Ninth Circuit's exhaustion requirement in this case conflicts with *Preiser*, *Wolff*, and the hard-and-fast rule that exhaustion is never required under section 1983. *Preiser* and *Wolff* recognized only two classes of claims that a constitutionally invalid sentence or conviction could give rise to: a section 1983 claim for damages, that, like other section 1983 claims, need not be exhausted, or a habeas corpus claim seeking a speedier release that is subject to the habeas corpus exhaustion requirement. *See Preiser*, 411 U.S. at 489-90, 494. Under *Preiser*, a claim seeking a

speedier release is not a section 1983 claim that must nonetheless be stayed for exhaustion--it is not a section 1983 claim at all but a habeas corpus claim. *Id.* at 489-90. In this case, however, the Ninth Circuit created a third class of hybrid claims unanticipated by *Preiser* or *Wolff*, or by Congress: damages claims that arise under section 1983 but that nonetheless are subject to the habeas corpus exhaustion requirement.

The Ninth Circuit acknowledged this conflict by confessing that it was "unable to come up with a principled way of distinguishing *Wolff*." App. A at 7a. Nonetheless, it imposed an exhaustion requirement, relying on vague forebodings that actions like Young's would frustrate federal-state comity. The Ninth Circuit's abstract enthusiasm for comity fails to recognize, as this Court did in *Preiser* and *Wolff*, that Congress has already struck the balance between the federal and state interests implicated here and has decided that section 1983 actions like Young's should go forward without exhaustion. In these circumstances,

> [i]t is not enough to argue before a court that a particular construction of § 1983 is inconsistent with 'principles of federalism' or 'federal-state comity.' To do so is to put the cart before the horse, for the only principles of federalism and comity that justify restricting the scope of § 1983 are those found in the Constitution or § 1983 itself.

BLACKMUN, *Section 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. Law Rev. 1, 23 (1985). The Ninth Circuit's reweighing of the comity interests in this case contrary to Congress' intent cannot justify dispensing with "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

In addition to the Ninth Circuit, six other circuits have failed to heed the commands of Congress and this Court and have imposed similar section 1983 exhaustion requirements.[2/] *See Gwin v. Snow*, 870 F.2d 616, 626-27 (11th Cir. 1989); *Offet v. Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hanson v. Heckel*, 791 F.2d 93, 94-96 (7th Cir.

[2/] Three of the nine opinions from other circuits cited by the Ninth Circuit (App. A at 5a-6a) do *not* stand for this proposition.

Brown v. Fauver, 819 F.2d 395 (3d Cir. 1987), did not raise or address the issue of whether a section 1983 damages action challenging the fact or duration of confinement is subject to the habeas corpus exhaustion requirement. The prisoner in that case, like the prisoners in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), brought a section 1983 action seeking only "restoration of his good-time credits and, consequently, speedier release from prison," and *not* money damages; thus *Preiser* plainly barred his action and the *Wolff v. McDonnell*, 418 U.S. 539 (1974) exception for damages actions did not apply. *Brown*, 819 F.2d at 397, 399.

Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974), was decided before this Court decided *Wolff*. In *Guerro*, the First Circuit held that the prisoner's section 1983 claim for damages, although it challenged the validity of his conviction, did not "come within the 'core of habeas' as defined in *Preiser*" and thus that *Preiser* was not controlling. *Id.* at 1252. Unlike Young, however, the prisoner in *Guerro* had brought his federal court section 1983 action during the pendency of his state-court direct appeal of his conviction, thus implicating concerns under *Younger v. Harris*, 401 U.S. 37 (1971), that the section 1983 action might interfere with an ongoing state prosecution. *Guerro*, 498 F.2d at 1251, 1253-55 & n.18. The First Circuit thus held that the action should be dismissed or held in abeyance pending the completion of ongoing state proceedings. *Id.* at 1255.

In *Mack v. Varelas*, 835 F.2d 995 (2d Cir. 1987), the prisoner's section 1983 damage claim was based on an alleged constitutional violation that, even if true, would not impair the validity of his conviction. *Id.* at 998-99. Thus, the Second Circuit held that the district court had improperly construed the complaint as a habeas corpus petition, that *Preiser* did not bar his action, and that he was not required to first exhaust his claim. *Id.* The Second Circuit did order his section 1983 action stayed, however, because, like the prisoner in *Guerro*, he had brought it while his state-court direct appeal of his conviction was pending. *Id.* at 999-1000. This stay, however, was not based on the habeas corpus exhaustion requirement but on prudential grounds "because one possible outcome of the [pending] state court proceedings could negate an essential element of [the prisoner's] claim." *Id.* at 999.

Guerro and *Mack* thus are examples of federal court abstention in the face of ongoing state proceedings and not of the application of the habeas corpus exhaustion requirement of 28 U.S.C. § 2254(b).

1986); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985); *Todd v Baskerville*, 712 F.2d 70, 73 (4th Cir. 1983); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir. Unit A July 1981). This Court should grant certiorari to correct this persistent error of the lower courts on this common and recurring question.

B. The Section 1983 Exhaustion Requirement Has Been Widely Criticized

The rule adopted by the Ninth Circuit has been widely criticized in other circuits because of its conflict with *Preiser* and *Wolff*. In *Gwin v. Snow*, 870 F.2d 616 (11th Cir. 1989), the Eleventh Circuit found that to require the exhaustion of state remedies before allowing a prisoner to pursue a section 1983 action challenging the legality of the fact or duration of confinement, but seeking only damages, "impermissibly conflict[s]" with *Preiser* and *Wolff*. *Id.* at 623. It nonetheless adhered to this exhaustion rule, but only because the rule was a binding circuit precedent. *Id.* at 624.

The Fifth Circuit's similar rule was criticized at its adoption by Judge Tjoflat, joined by Judges Tuttle, Goldberg, and Godbold, who said that the "plain language of the Supreme Court" in *Preiser* and *Wolff* foreclosed "the notion that the exhaustion doctrine applies in section 1983 prisoner damage suits." *Meadows v. Evans*, 550 F.2d 345, 346, 349 (5th Cir.) (en banc) (Tjoflat, J., dissenting), *cert. denied*, 434 U.S. 969 (1977); *see also Meadows v. Evans*, 529 F.2d 385, 387 (5th Cir. 1976) (panel opinion) (Tuttle, J., dissenting) (same).

Chief Judge Winter dissented from the Fourth Circuit's adoption of the rule that section 1983 damages claims implicating the legality of the fact or duration of confinement must first be exhausted, stating that *Wolff* precluded that result. *Hamlin v. Warren*, 664 F.2d 29, 34-35 (4th Cir. 1981) (Winter, C.J., dissenting), *cert. denied*, 455

U.S. 911 (1982).

A panel of the Seventh Circuit has recently criticized that circuit's holding in *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986) (per curiam), and the Eighth Circuit's holding in *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1989), as conflicting with *Preiser* and *Wolff*. *Viens v. Daniels*, 871 F.2d 1328, 1330-34 (7th Cir. 1989). *Viens* narrowed *Hanson* to permit prisoners to bring section 1983 damages claims without first exhausting state remedies where the alleged unlawful conduct caused both an excessive or illegal confinement and other damages. *Id.*

Judge Arnold dissented from the Eighth Circuit panel opinion in *Offet v. Solem*, 823 F.2d 1256 (8th Cir. 1987), describing the majority's reading of *Preiser* and *Wolff* as "completely untenable." *Id.* at 1261. Nor did he see any "inconsistency at all between *Preiser* and *Wolff*, either in holding or in rationale." *Id.* Judge Heaney of the Eighth Circuit also harshly criticized *Offet* for its conflict with *Preiser*, *Wolff*, and section 1983. *Bressman v. Farrier*, 900 F.2d 1305, 1309-1321 (8th Cir. 1990) (Heaney, J., dissenting).

This Court should grant certiorari to resolve the discord over the conflict between the section 1983 exhaustion requirement imposed on claims like Young's and the holdings of *Preiser* and *Wolff*.

C. The Court's Dictum in *Tower v. Glover* Did Not License the Ninth Circuit to Ignore the Precedential Effect of *Preiser* and *Wolff*

While candidly acknowledging that *Wolff* "appears to conflict with the rule we have just adopted" and that, like other circuits, "we, too, are unable to come up with a principled way of distinguishing Wolff," App. A at 7a, the Ninth Circuit nonetheless

held that dictum in *Tower v. Glover*, 467 U.S. 914 (1984), gave it license to disregard *Wolff*. As the Court has warned, however, it "'does not decide important questions of law by cursory dicta inserted in unrelated cases.'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). The Ninth Circuit's use of the *Tower* dictum to negate the plain meaning of *Wolff* is particularly problematical.

At issue in *Tower* was whether public defenders are immune from liability under section 1983. At the end of its opinion, the Court added, "We therefore have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Tower*, 467 U.S. at 923. On its face, this is an entirely neutral statement limited to the indisputable fact that *Tower* presented no occasion for deciding the question it describes. The statement carries no implication about what the Court believed had or had not been decided in *Wolff* or any other case.

The facts in *Tower* that prompted the dictum were "Glover's [the prisoner] successful initiation and prosecution of entirely parallel and duplicative state and federal actions" and the resulting "great waste of judicial resources." *Tower*, 467 U.S. at 923. Thus, the *Tower* dictum refers not to whether section 1983 claims must satisfy the habeas corpus exhaustion requirement but to the different question of whether a federal court in section 1983 action should abstain or stay its proceedings in the face of parallel *ongoing* state proceedings.

Where parallel state proceedings are ongoing, several different doctrines may counsel federal abstention. For example, a federal court should ordinarily abstain during an ongoing state criminal prosecution. *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974); *Younger v. Harris*, 401 U.S. 37, 54 (1971). None of these abstention doctrines,

however, is based on the habeas corpus exhaustion requirement, and none apply where, as in Young's case, there is no parallel state court proceeding under way. Thus, the *Tower* dictum addresses a very different question from the one presented by this case or by *Wolff*.

The Ninth Circuit's use of *Tower v. Glover* is a dangerous prescription for an unmoored jurisprudence. One foundation of our legal system is the basic principle that words can be made sufficiently certain in meaning to constrain public and private conduct, whether those words are the words of a contract, the language of a statute, or a decision of this Court. The use of extrinsic evidence to contradict the plain meaning of the language of a contract undermines this principle, as does the use of legislative history to contradict the plain meaning of a statute, or, as here, the use of dictum from one decision to contradict the plain meaning of another.

The Ninth Circuit did not hold that *Tower* had overruled or modified *Wolff*.[3/] Rather, it used the dictum in *Tower* to support an interpretation of *Wolff* that, as it admitted, "*Wolff* on its face appears to foreclose." App. A at 8a. Yet, just as the meaning of a statute is a fact, the meaning of a holding, clear on its face, by this Court is a fact, and dictum in a later case cannot alter the meaning. Thus, even if the *Tower* dictum had the meaning that the Ninth Circuit ascribed to it, reliance on that dictum to contradict the plain language of the holding of *Wolff* is untenable.

[3/] Nor could it have. The *Tower* Court agreed unanimously that the issue described by the majority in its dictum was not presented for decision in *Tower*. *Tower v. Glover*, 467 U.S. 914, 923 (majority opinion), 924 (concurrence) (1984). Because the issue of federal court abstention identified by the *Tower* dictum presented no case or controversy in *Tower*, the *Tower* Court was powerless under Article III of the Constitution to decide the issue or to overrule or modify *Wolff* in doing so.

D. The Discredited Collateral Estoppel Rationale Abandoned By the Ninth Circuit But Previously Relied on By Other Circuits is Meritless

In its initial opinion, the Ninth Circuit justified its section 1983 exhaustion requirement by arguing that a state prisoner could use a federal court's determination in his section 1983 damages action of the legality of the fact or duration of his confinement to "preclude relitigation of the issue in a subsequent state habeas proceeding" and circumvent the habeas exhaustion requirement. *Young v. Kenny*, 887 F.2d 237, 238 (9th Cir. 1989). "[A] federal court judgment that [Young's] . . . credits have been improperly withheld could be used in a subsequent state proceeding to compel reduction of his remaining time in prison, foreclosing the Washington state courts from considering the issue." *Id.* at 240. Other circuits have also used this collateral estoppel rationale to justify a section 1983 exhaustion requirement. *See, e.g., Offet v. Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hanson v. Heckel*, 791 F.2d 93, 96 (7th Cir. 1986); *Hamlin v. Warren*, 664 F.2d 29, 30 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982).

On rehearing the Ninth Circuit correctly recognized the fallacy of this collateral estoppel argument and abandoned it. App. A at 4a. The only defendants in Young's section 1983 damages action are state parole officials who are and can only be sued in their individual capacities. "Neither a State nor its officials acting in their official capacities are 'persons' under § 1983," and thus they cannot be sued under that section.[4/]

[4/] An exception to this rule exists that permits official-capacity suits for only injunctive relief to be brought against state officials under section 1983. *Will*, 109 S.Ct. at 2311 n.10. This, of course, is precisely the form of relief barred to a state prisoner under *Preiser* and *Wolff* as outside the scope of section 1983 and within the exclusive province of habeas corpus. Thus, this exception could never be invoked by a state prisoner to drag a state official in his official capacity into a section 1983 action for the purpose of asserting issue preclusion against the state in a subsequent state or federal habeas corpus proceeding.

Will v. Michigan Dept. of State Police, ___ U.S. ___, 109 S.Ct. 2304, 2311-12, 105 L.Ed.2d 45 (1989). Thus, neither the State of Washington nor any of its employees in their official capacities can ever be a party to Young's section 1983 damages action, nor could any other state or its officials in their official capacities ever be parties to a prisoner's section 1983 action for damages. Because neither the State nor its officials in their official capacities are parties, an essential element of collateral estoppel is absent and the State cannot be precluded from relitigating issues decided in this action in any subsequent action brought by Young.[5/]

Collateral estoppel, or issue preclusion, can only be asserted against a party that has "litigated and lost in an earlier action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). "Some litigants--those who never appeared in a prior action--may not be collaterally estopped without litigating the issue." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

Additionally, issue preclusion requires not only that the party to be precluded in the second action be a party to the prior action but also that the party appear in the same capacity in both actions. RESTATEMENT (SECOND) OF JUDGMENTS § 36 (1982). In a suit against a government official in his or her personal capacity the official does not represent the government and the government is not a party. "A victory in a personal-capacity action is a victory against the individual defendant, rather than against

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[5/] Apart from violating the rules of issue preclusion, to accord preclusive effect to the prisoner's section 1983 action in a subsequent habeas corpus or other post-conviction proceeding would allow section 1983 plaintiffs "to circumvent congressional intent [that states not be subject to suit under section 1983] by a mere pleading device" *Will*, 109 S.Ct. at 2311, and enforce against a state in a second action a judgment that no court would have had jurisdiction to adjudicate directly against the state in the first action.

the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense." *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985).

Because the governmental entity is not a party and has no opportunity to present its claims or defenses, an action against a government official in his or her personal capacity has no preclusive effect in a later suit against the governmental entity or against any of its officials in their official capacity, including the official who was a party to the first action in his or her personal capacity. 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4458 at 508-09 (1981) ("judgment against an official who has litigated in his personal capacity is not binding on his government"); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.411[3.-1] at 414-18, ¶0.411[4] at 436-38 (1988) ("a judgment rendered in one suit has no conclusive force in the other, if the person is a party to one suit solely as an individual, and is a party to the other solely in his capacity as . . . public official"); RESTATEMENT (SECOND) OF JUDGMENTS § 36 and comment e (1982); see also *United States v. Lee*, 106 U.S. 196, 217 (1882) ("the United States are not bound by a judgment to which they are not parties, and . . . no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment").

Any subsequent state or federal habeas corpus or other postconviction proceeding by Young challenging the fact or duration of his confinement and seeking either immediate release from that confinement or a shortening of its duration will be a suit against the State of Washington in which the State can relitigate any issue

concerning the legality of Young's confinement determined in this section 1983 action.[6/] This Court's review is required to correct the erroneous conclusion to the contrary by many courts that collateral estoppel would bar relitigation by the State of issues determined in a prisoner's section 1983 damages action.[7/]

CONCLUSION

The writ of certiorari should be granted.

DATED: September 24, 1990

Respectfully submitted,

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[6/] This is true even if the postconviction proceeding is nominally brought against one of the State's officials in his or her official capacity as Young's custodian, because only the State can provide the relief sought--release from confinement. "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity," and the entity is the source of any relief awarded. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (emphasis in original) (citation omitted); *see also id.* at 165-69 & nn. 11, 14; *Brandon v. Holt*, 469 U.S. 464, 471-73 (1985) (judgment in official-capacity suit imposes liability on the governmental entity alone); *Stafford v. Briggs*, 444 U.S. 527, 535-45 & n.10 (1980).

[7/] In their solicitude for the interests of the State, the Ninth Circuit and the other courts imposing a section 1983 exhaustion requirement have ignored the collateral estoppel that would run against the *prisoner* who exhausts. If the prisoner first litigates and loses in a state court proceeding against the State challenging the lawfulness of the fact or duration of his confinement, the individuals he sues in federal court under section 1983 can then invoke that adverse determination to preclude him from relitigating the issue. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). (By contrast, a federal habeas petitioner who exhausts is *not* precluded from relitigating issues determined adversely in state court.) The "procedural" section 1983 exhaustion requirement thus in many cases will bar prisoners forever from having their day in federal court on the merits of their section 1983 claims.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT H. YOUNG, *Plaintiff-Appellant,* v. PHYLLIS KENNY, THOMAS MANNING, HENRY ROSE, *Defendants-Appellees.*	No. 88-3995 D.C. No. CV-87-722-JET ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Submitted July 25, 1989*
San Francisco, California

Filed October 11, 1989
Amended June 25, 1990

Before: James R. Browning, Alex Kozinski and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Kozinski

SUMMARY

Constitutional Law

Modifying the district court's judgment of dismissal, the

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

court of appeals held that the district court must stay rather than dismiss a prisoner's 42 U.S.C. § 1983 action for deprivation of good-time credits until state remedies are exhausted.

The court amended its opinion filed October 11, 1989. With this amended opinion, the petition for rehearing was denied and the suggestion for rehearing en banc rejected. Appellant Washington state prisoner Robert Young filed a section 1983 claim for damages, alleging that state officials had unconstitutionally failed to apply jail-time credits to his prison sentence. Young appealed the district court's dismissal of his claim.

[1] Where a state prisoner challenges the fact or duration of his confinement, his sole remedy is a writ of habeas corpus. This is largely because, while a habeas prisoner must exhaust state remedies, a section 1983 plaintiff need not. [2] If habeas were not the exclusive federal method for challenging the length of a state prison sentence, [3] the purpose of the exhaustion requirement, to give the state courts the first opportunity to rule on the claims of state prisoners, would be frustrated. [4] All nine federal circuit courts to consider this question have arrived at the same conclusion. [5] Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld, would undermine the exhaustion requirement and frustrate important values of federal-state comity. Dismissal, however, could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. A prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, some district courts stay, rather than dismiss section 1983 claims. This is a wise policy. It would hardly promote the goals of the 1871 Civil Rights Act to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late.

COUNSEL

Robert H. Young, Pro per, Shelton, Washington, for the plaintiff-appellant.

Aaron K. Owada, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

ORDER

The opinion filed on October 11, 1989, is amended as reflected in the attached revised opinion.

With these amendments the petition for rehearing is denied. The full court has been advised of the suggestion for en banc rehearing and no judge has requested a vote thereon. The suggestion for rehearing en banc is therefore rejected. Fed. R. App. P. 35(b).

OPINION

KOZINSKI, Circuit Judge:

Robert Young, a Washington state prisoner, filed a complaint for damages pursuant to 42 U.S.C. § 1983 (1982), claiming that state officials had unconstitutionally failed to apply jail-time credits to his prison sentence. The district court dismissed his complaint; we modify the district court's order to stay rather than dismiss the claim.

[1] 1. Where a state prisoner challenges the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90, 500 (1973).[1] This is largely because, while a habeas petitioner

[1]Where a prisoner wishes to challenge the *conditions* of his confinement, by contrast, a section 1983 action is a proper avenue of redress.

must exhaust state remedies, *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982), a section 1983 plaintiff need not. *Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975). The exhaustion requirement in federal habeas actions "is rooted in considerations of federal-state comity." *Preiser*, 411 U.S. at 491. It is well-established that the states have a substantial interest in the administration of their prisons, and in the correction of any problems that may arise therein. "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Id.* at 492.

[2] If habeas were not the exclusive federal method for challenging the length of a state prison sentence, the exhaustion requirement could be undermined by a section 1983 plaintiff who obtains a federal court's ruling that his sentence is too long. A prevailing section 1983 plaintiff in an action seeking release from jail or other prospective relief could obtain a judgment against state officials in their official capacities. *See Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 n.10 (1989). Such a judgment might preclude the state from relitigating the issue in a subsequent state habeas proceeding, frustrating the exhaustion requirement and the important considerations of federal-state comity it protects.

[3] Federal-state comity is a concern even where, as here, the prisoner does not specifically request the reduction of his sentence in the section 1983 complaint. Before a district court could award damages to Young, it would have to determine that his jail-time credits were unconstitutionally withheld. Such a ruling would not bar a state from relitigating the issue in a subsequent state habeas proceeding because "neither a State nor its officials acting in their official capacity are 'persons' under § 1983" when the relief requested is damages. *Will*, 109 S. Ct. at 2312. Nevertheless, should a federal court find a term of imprisonment unlawful without first giv-

ing the state court system an opportunity to correct its own constitutional errors, it may result in "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. at 490. Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement — to give the state courts the first opportunity to rule on the claims of state prisoners — would accordingly be frustrated. As a result, habeas must be the exclusive federal remedy not just when a state prisoner *requests* the invalidation or reduction of his sentence, but whenever the requested relief requires as its predicate a determination that a sentence currently being served is invalid or unconstitutionally long.

[4] All nine federal circuit courts to consider this question have arrived at the same conclusion. *See Guerro* v. *Mulhearn*, 498 F.2d 1249, 1251-55 (1st Cir. 1974) (request for money damages barred where resolution would require determination that state conviction was invalid); *Mack* v. *Varelas*, 835 F.2d 995, 998 (2d Cir. 1987) (section 1983 action proper where success would not lead to more speedy release); *Brown* v. *Fauver*, 819 F.2d 395, 397-99 (3d Cir. 1987) (restoration of good-time credits obtainable only via writ of habeas corpus where sentence still being served); *Todd* v. *Baskerville*, 712 F.2d 70, 72-73 (4th Cir. 1983) (same); *Richardson* v. *Fleming*, 651 F.2d 366, 373 (5th Cir. Unit A July 1981) ("any § 1983 action which draws into question the validity of the fact or length of confinement must be preceded by exhausting state remedies," regardless of the relief sought); *Hadley* v. *Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (per curiam) (federal court must " 'stay its hand where disposition of the damage action would involve a ruling implying that a state conviction is or would be illegal' ") (quoting *Guerro*, 498 F.2d at 1252); *Hanson* v. *Heckel*, 791 F.2d 93, 94-97 (7th Cir. 1986) (per curiam) (claim of unconstitutional deprivation of good-time credits sounds exclusively in habeas where sentence still being served, despite fact that complaint sought damages but

not restoration of credits); *Offet* v. *Solem*, 823 F.2d 1256, 1258-61 (8th Cir. 1987) (federal court must stay section 1983 action for deprivation of good-time credits until plaintiff has exhausted state remedies); *Gwin* v. *Snow*, 870 F.2d 616, 626-27 (11th Cir. 1989) (section 1983 claim must be treated as habeas petition if relief requested would "undermine" conviction).

Such a rule is not inconsistent with our prior decisions, which have never expressly addressed the question, but point in the same general direction. *See Toussaint* v. *McCarthy*, 801 F.2d 1080, 1102-03 (9th Cir. 1986) (habeas not exclusive remedy where prisoners seek only to be moved from one location to another within a prison), *cert. denied*, 481 U.S. 1069 (1987); *Ybarra* v. *Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 682 (9th Cir. 1984) (federal court may not rule on prisoner's section 1983 claim where "[a]lthough he does not specifically request release, the finding of such declaratory relief in his favor would show that release was required"); *Clutchette* v. *Procunier*, 497 F.2d 809, 812-14 (9th Cir. 1974) (prisoner may bring section 1983 action to challenge disciplinary procedures having only "speculative and incidental effect" on length of sentence without first exhausting state remedies), *modified*, 510 F.2d 613 (9th Cir. 1975), *rev'd on different grounds sub nom. Baxter* v. *Palmigiano*, 425 U.S. 308 (1976). *See also Bergen* v. *Spaulding*, No. 87-4133, slip op. 8709, 8716 (9th Cir. Aug. 3, 1989) (permitting section 1983 suit for deprivation of good-time credits to proceed where plaintiff no longer serving prison sentence). We become the tenth circuit court to adopt it.

2. Although we join our sister circuits, we share a concern expressed by many of them. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Supreme Court observed:

> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But

> the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* . . . .

Id. at 554-55 (citation and footnote omitted). We are acutely aware that this language appears to conflict with the rule we have just adopted; this passage from *Wolff* may suggest that the exclusivity of habeas turns on the type of relief requested by the plaintiff. We are not the first court to worry about this problem: Many of the decisions cited above discuss *Wolff* at length and attempt to distinguish it, none very persuasively. *See, e.g., Offet*, 823 F.2d at 1259-61; *Todd*, 712 F.2d at 72-73; *Hanson*, 791 F.2d at 95-96. While we, too, are unable to come up with a principled way of distinguishing *Wolff*, we agree with Judge Bowman, writing for the Eighth Circuit, that "to read *Wolff* as allowing a state prisoner to avoid the exhaustion requirement by artful pleading is to set *Wolff* at odds with the rationale of *Preiser*, and we do not believe that the Court intended such a result." *Offet*, 823 F.2d at 1260.

We would nevertheless feel bound to follow *Wolff*, and thereby create a conflict with nine of our sister circuits, were it not for a brief excursion made by the Supreme Court at the end of its opinion in *Tower* v. *Glover*, 467 U.S. 914 (1984). Even though the issue we consider today was not presented in *Tower*, the Court went out of its way to note: "We . . . have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Id.* at 923.

Although this statement is dictum,[2] we take it seriously: Because the statement would make no sense if *Wolff* had resolved the question we face today, we presume that the *Tower* majority deliberately included it in its opinion to signal that the Court deems itself not to have ruled on our issue. Thus, while *Wolff* on its face appears to foreclose the decision we reach, the Court evidently does not view it that way. This is fortunate, as it spares us the necessity of creating an inter-circuit conflict on a fundamental and recurring issue.

[5] 3. Because Young is still in prison and has failed to exhaust his state remedies, a federal court judgment that his jail-time credits have been improperly withheld would undermine the exhaustion requirement in federal habeas actions and frustrate important values of federal-state comity.[3] The

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[2]Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, complained about this:

> Although the issue was never raised by the parties, and although, as the Court properly concedes, the issue has absolutely no bearing on the disposition of this case, the Court nevertheless has seen fit to observe that it "ha[s] no occasion to decide" whether federal courts should "abstain" from deciding a state prisoner's § 1983 suit for damages stemming from an unlawful conviction pending that prisoner's exhaustion of collateral state-court challenges to his conviction. The reasons why the Court has no "occasion" to decide this question are clear enough: The question was never pressed or passed upon below, never briefed or argued in this Court, and, because respondent Glover has already exhausted all state-court remedies, the issue has no bearing whatsoever on the proper resolution of the controversy we have been called upon to decide.

467 U.S. at 924 (Brennan, J., concurring) (citation omitted). The four concurring justices joined all of *Tower* except the paragraph discussing the issue raised in this case.

[3]The district court did not consider Young's claims that restoration of his jail-time credits will *not* reduce the sentence he is currently serving. On remand, the district court shall determine whether restoration of Young's jail-time credits could result in his speedier release. If not, habeas would no longer be his exclusive federal remedy, *see Preiser*, 411 U.S. at 500, and he could therefore proceed in federal court under section 1983.

district court, following this line of reasoning, dismissed Young's complaint. Dismissal, however, could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. Exhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, district courts in some circuits stay, rather than dismiss, section 1983 complaints in this posture. *See, e.g., Mack,* 835 F.2d at 999-1000; *Richardson,* 651 F.2d at 373; *Offet,* 823 F.2d at 1261. This is a wise policy; it would hardly promote the goals of the Civil Rights Act of 1871 to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late.

We therefore vacate the district court's order dismissing Young's complaint. The court shall, instead, stay federal proceedings so that Young may have an opportunity to pursue state remedies. Young may proceed further in the district court only after he has exhausted those remedies or is no longer serving a prison sentence capable of being reduced by the application of jail-time credits.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT H. YOUNG,

Plaintiff,

vs.

PHYLLIS KENNY, et al.,

Defendant.

NO. C87-722T

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This matter has been referred to United States Magistrate Franklin D. Burgess pursuant to 28 U.S.C. §636(b)(1)(B) and local Magistrates Rule MR4. This matter comes before the court upon the defendants' Motion to Dismiss for Failure to State a Claim, and pursuant to an Order issued February 23, 1988, commanding that the issue of exhaustion of state remedies be briefed.

The plaintiff is a state prisoner who seeks damages and prospective injunctive relief (under the Civil Rights Act, 42 U.S.C. § 1983) for the defendants' alleged improper calculation of his jail time credits. The defendants moved for dismissal contending that the plaintiff has failed to present a wrong of constitutinal dimensions (a fundamental prerequisite for a § 1983 action). Before reaching the merits of the defendants' arguments,

however, this Magistrate requested briefing from the parties regarding whether this court should exercise jurisdiction under Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); and Offet v. Solem, 823 F.2d 1256, 1258 (8th Cir. 1987).

The plaintiff's briefing, while remarkably well thought-out and detailed, skirts the primary concern of the exhaustion issue. Without reaching the merits of the action, therefore, this Magistrate recommends that this matter be dismissed for failure to exhaust state remedies.

APPLICABILITY OF EXHAUSTION REQUIREMENT

A habeas corpus action, one intended to secure federal habeas relief from state incarceration, must be exhausted in the state courts prior to being presented in federal court. 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 520, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). This requirement is meant to provide the state's highest court an opportunity to rule definitively on the legal issues raised by a state prisoner, thus serving the policy of comity between state and federal courts. Rose v. Lundy, supra, 455 U.S. at 515-20.

Ordinarily, an action under 42 U.S.C. § 1983 need not be exhausted. Wilwording v. Swenson, 404 U.S. 249, 251, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971). However, a § 1983 action that raises habeas-style claims is not maintainable without a showing of exhaustion. See, for example, Preiser v. Rodriguez, 411 U.S. 475,

93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The court there held that where state prisoners are seeking the reinstatement of good-time credits that would result in the shortening of their sentences, the action is most properly treated as a petition for habeas corpus. The court, in distinguishing Wilwording, stated that

> [i]f a petitioner seeks to attack both the conditions of his confinement and the fact or length of confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies.

Preiser v. Rodriguez, 411 U.S. at 499, n.14.

Even if a prisoner does not seek habeas-style relief (release or a shortening of sentence), exhaustion must be shown as to any claims regarding the legitimacy of continued incarceration. Because of the principle of res judicata, "a federal ruling on the constitutional issue underlying the § 1983 claim effectively would preclude state consideration in a subsequent state proceedings." Offet v. Solem, 823 F.2d 1256, 1258 (8th Cir. 1987). Herein lies the core of the problem facing the court, and the flaw in the plaintiff's briefing. The plaintiff's § 1983 action must be founded upon a violation of a constitutional right. The court could therefore grant no relief without in fact holding that the plaintiff's constitutional rights had been violated. Once obtaining such a judgment (finding a constitutional violation), the state courts would be bound thereby in any future state proceedings initiated by the plaintiff. The plaintiff would thus be able to evade the requirement of exhaustion.

In Offet, a prisoner sought damages and declaratory relief under 42 U.S.C. § 1983 from prison officials, arguing that they had unconstitutionally deprived him of good-time credits on his sentence. The Eighth Circuit held that the prisoner was required to exhaust his claims:

> Although Offet ostensibly challenges the system by which his good time credits were deprived, a finding in his favor on the underlying constitutional issue inevitably would lead to the restoration of those credits in a subsequent habeas proceeding against the state. The indirect effect of a successful § 1983 action by Offet thus would be to shorten the length of his sentence. From the standpoint of federal-state comity, we see no difference between the effect of a federal judgment directing release of a prisoner and one which leaves the state court no choice but to order the same.

Offet, 823 F.2d at 1259 (emphasis added).

In Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984), the Ninth Circuit similarly probed the collateral estoppel effect of § 1983 relief.

> It is clear the basis of Ybarra's claim is a challenge to the constitutionality of his conviction; in order to prevail on this claim, he must collaterally void his state court conviction. [Citation omitted]. Although he does not specifically request release, the finding of such declaratory relief in his favor should show that release was required.

Ybarra, 723 F.2d at 682. Accordingly, an unexhausted § 1983 action challenging the constitutionality of continued confinement must be deemed an improper circumvention of the writ of habeas corpus.

The plaintiff points to Wolfe v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1973), as supporting his argument. Indeed, the plaintiff is correct:

> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S. at 499 n.14. [Footnote omitted]. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.
>
> We therefore conclude that it was proper for the Court of appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled. [Footnote omitted].

Wolff v. McDonnell, supra, 418 U.S. at 554-5.

However, this Magistrate is inclined to agree with the Eighth Circuit that "Wolff was not intended to undercut Preiser's policy requiring exhaustion." Offet, 823 F.2d at 1260. Without reviewing the Offet analysis at length, this Magistrate would refer the parties to the discussion at 823 F.2d 1259-60.

Furthermore, the Eighth Circuit noted that the Supreme Court itself did not view Wolff as settling this issue. In a later decision, Tower v. Glover, 467 U.S. 914, 922, 104 S.Ct. 2820, 2825, 81 L.Ed.2d 758 (1984), the Court wrote that it had "no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damage stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the convictions itself." This basic issue is thus evidently still open, and this court is bound to follow the Ninth Circuit view as presented in Ybarra.

Based on the above, this Magistrate must conclude that the plaintiff is required to exhaust these claims in state court. An issue is not deemed to be exhausted until it has been presented to the State's highest court. Picard v. Connor, 404 U. S. 270, 276, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). It appears from the Complaint that the plaintiff has not presented these issues to the State Supreme Court.[1] Accordingly, it is the recommendation of this Magistrate that this action be dismissed.

DATED this 26 day of May, 1988.

UNITED STATES MAGISTRATE

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[1]The plaintiff contends that there are inadequate remedies at the state court level. He notes that he cannot in a state Personal Restraint Petition seek the damages sought herein. However, he does not explain why he is unable to file a state tort action instead.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT H. YOUNG,

Plaintiff,

vs.

PHYLLIS KENNY, et al.,

Defendant.

NO. C87-722T

O R D E R

Plaintiff has filed a complaint herein pursuant to 28 U.S.C. § 1983 and the matter has been referred to the United States Magistrate who has made a Report and Recommendation in this matter.

After reviewing the file herein and the Report of the Magistrate, it is hereby

ORDERED:

1. The Report and Recommendation of the Magistrate is hereby approved and adopted by this court.

2. This action is dismissed.

3. The Clerk of the court shall direct copies of this order to counsel for plaintiff (if any, otherwise to plaintiff) and to counsel of record for defendant.

DATED this 13th day of June, 1988.

Jack E. Tanner
UNITED STATES DISTRICT JUDGE

l.c

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Appendix D

Title 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Should the Court impose the habeas corpus exhaustion-of-state-remedies requirement as a prerequisite to a state prisoner bringing a 42 U.S.C. § 1983 action for monetary damages against state employees in their personal capacities for the denial of sentence credits.

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NO. 90-5854

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

ROBERT H. YOUNG,

Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING,
and HENRY ROSE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Respondents Phyllis Kenny and Henry Rose, acting through their attorneys, Kenneth O. Eikenberry, Attorney General; Kathleen D. Mix, Senior Assistant Attorney General, and Martin E. Wyckoff, Assistant Attorney General, respond to Robert H. Young's petition for writ of certiorari.

I. ISSUES PRESENTED

A. The Supreme Court should deny this petition as Mr. Young does not present good reasons for this Court to grant certiorari.

B. There is not a live case or controversy at the current time. Therefore, the Supreme Court lacks subject matter jurisdiction to entertain this writ.

C. The doctrines of res judicata and collateral estoppel, along with the doctrines of federalism and comity, militate against the granting of this writ.

II. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as amended on denial of the petition for rehearing, is reported at 907 F.2d 874. The Court of Appeals' initial opinion was published at 887 F.2d 237. The United States District Court's order is unreported.

III. JURISDICTION

The Court of Appeals' amended opinion and order denying rehearing were filed and entered on June 25, 1990. The jurisdiction of the Supreme Court rests upon 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 and 42 U.S.C. § 1983.

V. STATEMENT OF THE CASE

On October 16, 1987, Mr. Young filed the 42 U.S.C. § 1983 complaint that is the subject of this petition. The action was brought against members of the Washington State Indeterminate Sentence Review Board (ISRB). This agency is responsible for the calculation of a prisoner's term of confinement, including the award or denial of time credits. Further, the ISRB determines if a person shall be paroled. Mr. Young's original request for relief sought:

1. A reduction of his maximum sentence based on the award of credits for jail time served.

2. Damages for failure to apply jail credits against his minimum term.
3. Prospective injunctive relief to preclude the board from denying him jail credits. CR 2.[1]

On January 14, 1988, the ISRB granted Mr. Young 255 days time credit against his maximum sentence for jail time served. This was the full amount of time credit available to Mr. Young. Mr. Young then deleted from the complaint his first request for relief. On February 23, 1988, the United States District Court *sua sponte* ordered the parties to brief the question of whether Mr. Young must exhaust state remedies before proceeding in his 42 U.S.C. § 1983 action. CR 21. Apparently, the District Court was unaware that on January 14, 1988, Mr. Young had received the time credits in question.

Ultimately, the District Court dismissed the complaint for failure to exhaust state remedies. CR 51 and 52. A timely appeal was filed from the order of dismissal and final judgment. CR 57.

In Mr. Young's opening brief to the Ninth Circuit, Mr. Young stated, "Plaintiff's complaint sought damages and prospective injunctive relief only." The Ninth circuit rendered its opinion. In the subsequent petition for rehearing en banc, counsel for Young improperly presented the case as only a request for damages, failing to inform the court of the prospective injunctive relief also sought in the complaint. Young's counsel never informed the Ninth Circuit of the full spectrum of relief sought in the complaint.

The Ninth Circuit vacated the original opinion and denied rehearing. A new opinion was entered based on Mr. Young's counsel's misrepresentation of the nature of the relief sought in the original complaint. *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990).

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[1] CR refers to the United States District Court Clerks Record; *e.g.*, Clerk's Record Document Number 2.

Mr. Young now petitions this Court for a writ of certiorari and again misrepresents the relief sought in his 42 U.S.C. § 1983 action.

VI. REASONS FOR DENYING THE WRIT

A. THE SUPREME COURT SHOULD DENY THIS PETITION AS MR. YOUNG DOES NOT PRESENT GOOD REASONS FOR THIS COURT TO GRANT CERTIORARI.

Certiorari is not a matter of right, but rather a matter of judicial discretion. Sup. Ct. R. 10. This petition for certiorari does not meet any of the criteria set forth in Rule 10.

As Mr. Young notes, six other circuits are in accord with the Ninth Circuit. *See* Petition, p. 7. Thus, no Court of Appeals has rendered a decision that conflicts with the Ninth Circuit's decision. The Ninth Circuit actually found that nine other circuits had considered the question and arrived at the same conclusion. Mr. Young in Footnote 2 of his Petition attempts to distinguish three of these cases. These distinctions are meritless, as the ultimate holding in each case mandated exhaustion of state remedies based on the same principles of comity that are at issue here.[2]

As no circuits are in conflict, petitioner does not meet the criteria set forth in Subsection (a) of Sup. Ct. R. 10.

Neither does the petitioner meet the criteria set forth in Subsection (b). No state court decision is in question.

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[2]The First Circuit found *Preiser* not controlling but stated *Preiser* was highly relevant and that the integrity of the writ of habeas corpus must not be circumvented. The Court noted that due respect to the principles of federalism and comity required the Court to dismiss most of Guerro's claims. The First Circuit remanded to the District Court to determine if Guerro's damage claim required the Court to consider the legality of Mr. Guerro's conviction. *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974). The Second Circuit noted that Mr. Mack's claim did not rely on an attack on either the validity of his conviction or the duration of his confinement. The Second Circuit noted that a prisoner could not mount that type of challenge in a 42 U.S.C. § 1983 action. *Mack v. Varelas*, 835 F.2d 995 (2nd Cir. 1987).

Respondents agree with Mr. Young's interpretation of *Brown v. Fauver*, 819 F.2d 395 (3rd Cir. 1987). However, the Third Circuit has not addressed the question presented today and, thus, has not ruled contrary to any other circuit or the Supreme Court.

Mr. Young argues that Rule 10(c) applies. He contends that the circuits have decided the legal question now before the Court in a way that conflicts with the Supreme Court decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Wolff v. McDonnell*, 418 U.S. 539 (1974). Such is not the case.

The Court in *Preiser* noted that the essence of a habeas corpus petition is an attack by a person in custody upon the legality of custody or the duration of his or her confinement. *Preiser*, 411 U.S. at 487.

In *Preiser* the plaintiffs sought restoration of good time credits, which clearly fell within the core of habeas. On appeal plaintiffs argued that if they were forced to exhaust state court remedies an adverse ruling would have a res judicata effect in subsequent civil rights actions. The *Preiser* Court carefully noted that that question was not before it. The Court stated:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief—restoration of their good-time credits—and our holding today is limited to that situation.

Preiser, 411 U.S. at 494. Although the Court addressed the availability of a damage action in dicta, the Court also went on at great length to clarify previous rulings. The Court noted that when an inmate brings a civil rights action challenging the conditions of confinement, rather than the fact or length of confinement, such an action would be allowed. *Preiser*, 411 U.S. at 498-99. This dicta formed the basis for the Court's ruling in *Wolff v.McDonnell*. The *Wolff* court noted that:

> [H]abeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 *along with suits challenging the conditions of confinement rather than the fact or length of custody.*

Wolff, 418 U.S. at 554. (Emphasis added.)

The plaintiffs in *Wolff v. McDonnell* sought damages for deprivation of civil rights resulting from the use of allegedly unconstitutional procedures. *Wolff*, 411 U.S. at 553. The *Wolff* Court carefully noted that in the prayer of the amended complaint damages in the sum of $75,000 were sought "for the deprivation of the various constitutional rights involved in litigation, necessarily including the right to due process." *Wolff v.McDonnell*, 418 U.S. at 553, n. 11. Thus, the plaintiffs in *Wolff* were not attacking either the length or fact of their custody but rather a condition of confinement. They were challenging the constitutionality of prison procedures.

In the case currently at bar, Mr. Young seeks damages for failure to certify jail credit time. In order to succeed on the claim, he must establish liability, which will entail a finding that he is or was entitled to a shortening of his sentence. Thus, a critical element of his action touches on the core of habeas as Mr. Young in fact attacks the length of his confinement. Such a case is clearly barred by the holdings of both *Preiser* and *Wolff*.

The Fifth Circuit noted that there was a possible conflict if the *Wolff* court's decision was improperly interpreted. The Fifth Circuit stated that:

> Although the opinion is unclear as to whether the loss of good time credits could be claimed as an element of damages, we do not believe the Court so intended. The Supreme Court ruled that on remand the district court was foreclosed from issuing an injunctive restoration of good time credits, but could assist a plaintiff in obtaining "ancillary relief" by enjoining the prospective enforcement of invalid prison regulations.
>
> From the Court's delineation of permissible and impermissible uses of the district court's injunctive and declaratory powers on remand of the *Wolff* case, we conclude that the Court authorized the district court to examine the constitutionality of the state prison procedure, and to award damages which were incidental to an invalid proceeding. *Since the district court was expressly forbidden to enter an injunction concerning the merits of the issue before the state administrative body*

> *(i.e., the proper length of confinement), however, it follows as a matter of logic that the district court was similarly prohibited from awarding damages for excessive confinement.*

Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976). (Emphasis added.)

This is the interpretation of each Court of Appeals to consider the question. This interpretation reconciles *Preiser* with *Wolff*. To give *Wolff* the meaning petitioner here seeks would mean that the *Wolff* case overruled *Preiser*. However, *Wolff* cited *Preiser* with approval and with no indication that the Court intended to overrule or modify the *Preiser* decision.

Further evidence that the Fifth Circuit's interpretation is correct is found in *Preiser*. The court succinctly stated:

> If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim *relating to the conditions of his confinement.*

Preiser, 411 U.S. at 499, n. 14. (Emphasis added.)

Thus, eight circuits excluding the Ninth Circuit have reached the same conclusion. If a 42 U.S.C. § 1983 action attacks the fact or length of confinement the writ of habeas corpus is the sole remedy. A 42 U.S.C. § 1983 action that demands adjudication of either the validity of confinement or length of confinement as a predicate to a finding of liability is barred by 28 U.S.C. § 2254. The Ninth Circuit agrees with these eight circuits. *See generally, Young v. Kenny*, 907 F.2d 874, 876 (9th Cir. 1990).

This court should deny the petition for certiorari as the petitioner fails to set forth any reason pursuant to Sup. Ct. R. 10 for granting certiorari.

B. THERE IS NOT A LIVE CASE OR CONTROVERSY AT THE CURRENT TIME. THEREFORE, THE SUPREME COURT LACKS SUBJECT MATTER JURISDICTION TO ENTERTAIN THIS WRIT.

It is uncontested that on January 14, 1988 the ISRB credited Mr. Young's maximum sentence with 255 days of jail time credits. Thus, since January 14, 1988, there has not been a live case or controversy as to the issue of whether Mr. Young must exhaust state remedies pursuant to habeas corpus prior to bringing this 42 U.S.C. § 1983 action.

Neither a state nor federal habeas petition could be maintained as Mr. Young would have already received the relief requested. Thus, the habeas corpus action would be moot. The 42 U.S.C. § 1983 action is not moot as Mr. Young may proceed with a damage claim. *See, City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

The issue before the Court today is whether Mr. Young needs to exhaust habeas corpus remedies prior to proceeding in a 42 U.S.C. § 1983 action for damages and prospective injunctive relief.

Persons seeking to invoke the power of federal courts must allege an actual case or controversy in order for the Court to have subject-matter jurisdiction. U.S. Const.art. III, § 2, cl. 1; *Powell v. McCormack*, 395 U.S. 486 (1969).

An actual controversy between the parties must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated. *Wiley v. National Collegiate Athletic Association*, 612 F.2d 473 (10th Cir. 1979); *cert. denied*, 446 U.S. 943.

By the time the District Court entered the order dismissing this case, the reason for dismissal no longer existed. The Ninth Circuit never had a live case or controversy in this case. Before the appeal was filed, Mr. Young received the jail time credits that formed the basis for the appeal.

This Court should deny the writ for certiorari or, in the alternative, remand this case to the Ninth Circuit for deter-

mination as to whether the opinion in 907 F.2d 874 must be vacated for want of subject matter jurisdiction.

C. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, ALONG WITH THE DOCTRINES OF FEDERALISM AND COMITY, MILITATE AGAINST THE GRANTING OF THIS WRIT.

1. *The Issue of Res Judicata.*

Res judicata is claim preclusion. Contrary to Mr. Young's contentions, the Supreme Court has recognized that res judicata precludes allowing 42 U.S.C. § 1983 actions to go forward if they touch upon the core of habeas. The *Wolff* Court noted that it anticipated the normal principles of res judicata would apply in a 42 U.S.C. § 1983 action. *Wolff*, 418 U.S. 554, n. 12. The *Preiser* Court noted that the principles of res judicata fully apply to civil rights actions:

> Accordingly, there would be an inevitable incentive for a state prisoner to proceed at once in federal court by way of a civil rights action, *lest he lose his right to do so.* This would have the unfortunate dual effect of denying the state prison administration and the state courts the opportunity to correct the errors committed in the State's own prisons, and of isolating those bodies from an understanding of and hospitality to the federal claims of state prisoners in situations such as those before us.

Preiser, 411 U.S. at 497. (Emphasis added.)

If Mr. Young were allowed to proceed in his 42 U.S.C. § 1983 action prior to exhausting habeas corpus proceedings, the issue of the length of his custody would have to be litigated in order for Mr. Young to prove liability. This would circumvent 28 U.S.C. § 2254 with its attendant state exhaustion requirements. Congress intended 28 U.S.C. § 2254 to be the sole remedy.

2. *The Issue of Collateral Estoppel.*

Mr. Young attempts to persuade the Court that the doctrine of collateral estoppel is inapplicable. Mr. Young's

argument is prefaced upon his assertion that he sought only damages against state officials in their individual capacity, not their official capacity. Thus, he concludes that because the State and its employees in their official capacities are not parties to the 1983 action an essential element of collateral estoppel is absent.

Mr. Young misstates the facts. The complaint, in fact, sought prospective injunctive relief as well as damages. *See*, Complaint, CR 2; *see also*, Mr. Young's Opening Brief to the Ninth Circuit. In Mr. Young's opening Ninth Circuit brief he states, "Plaintiff's Complaint Sought Damages and Prospective Injunctive Relief Only." Opening Brief, p. 4.

Because prospective injunctive relief is sought, the defendants are sued in both their individual and official capacity. *See, Ex parte Young,* 209 U.S. 123 (1908). The essential element of collateral estoppel Mr. Young claims is absent is fulfilled, and the danger that a 42 U.S.C. § 1983 action will have preclusive effect on a subsequent 28 U.S.C. § 2254 action is present. The many circuits have recognized this potential danger and uniformly refuse to allow the civil rights action to proceed prior to exhaustion of habeas corpus remedies. The Court should deny this writ.

3. *The Doctrines of Federalism and Comity.*

It is the principles of federalism and comity which led the federal courts to stay actions such as Mr. Young's. Only by staying the 42 U.S.C. § 1983 action and requiring exhaustion of state remedies can the federal court avoid "interference with matters of intense and intimate state concern." *Guerro*, 498 F.2d at 1253.

States have substantial interests in the administration of their prisons and their state courts. There is a strong comity consideration at stake here. State, not federal courts, should be allowed to address issues regarding the validity of a conviction or the length of incarceration prior to federal intervention. *See*, *Preiser,* 411 U.S. at 491. Indeed, the *Preiser* Court stated:

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems.

Preiser, 411 U.S. at 491-492. The Supreme Court has long recognized the principles of comity and federalism at stake here and should not jeopardize these principles, as recognized by the many circuits, by granting this writ.

VII. CONCLUSION

For the above-stated reasons, the respondents respectfully request that this Court either deny the petition for writ certiorari, or remand this case to the Ninth Circuit for a determination as to whether the Ninth Circuit had subject-matter jurisdiction to entertain any appeal in this case.

DATED this 19th day of December, 1990.

Respectfully submitted,

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No. 90-5854

In The

Supreme Court of the United States

October Term, 1990

ROBERT H. YOUNG,

Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING, and HENRY ROSE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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In The

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ROBERT H. YOUNG,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner Robert Young, seeking certiorari so that the Court may decide whether his prisoner section 1983 damages action is subject to the habeas exhaustion requirement, hereby responds to three of the meritless points raised in opposition:

- The assertion that the prisoners in *Wolff v. McDonnell*, 418 U.S. 539 (1974), sought damages only for conditions of confinement and not because, like Young, they had been unconstitutionally denied sentence credits.

- The assertion, contrary to the respondents' repre-

sentations below, that Young seeks injunctive relief that would affect the duration of his current term of incarceration, and that the presence of such a claim would require his action to be stayed in any case.

- The assertion, contrary to the respondents' representations below, that the issue of whether Young need exhaust his state judicial remedies is moot because he has already received administratively all the relief affecting the duration of his sentence to which, in their sole judgment, he is entitled.

THE RESPONDENTS' ATTEMPT TO DISTINGUISH *WOLFF V. MCDONNELL* IS MERITLESS

Judge Kozinski, writing for the Ninth Circuit in this case, candidly described the troubling conflict between the result that court reached and the Court's analysis in *Wolff*. Petition for Certiorari, App. A at 6a-8a. The respondents dodge the problem. They do not acknowledge the conflict, nor do they claim that the dicta of *Tower v. Glover*, 467 U.S. 914 (1984), resolves it. Instead, they attempt what the court of appeals found untenable, namely to distinguish *Wolff* from Young's case. The respondents assert that *Wolff* did not involve any claim for damages for the unconstitutional denial of sentence credits, as does Young's case, but only a claim for damages on account of conditions of confinement.

A simple reading of *Wolff* discredits this argument. *Wolff*, 418 U.S. at 553-55. Like Young, the prisoners in *Wolff* asserted that they had been unconstitutionally denied sentence credits and sought damages for these unconstitutional deprivations. *Id.* at 553 (prisoners "sought three types of relief," including damages and credit restoration, for "the taking of good time [that] violated the Due Process Clause"). It was only because the *Wolff* prisoners had sought damages for the sentence credits they were

denied that the Court had any occasion to analyze and distinguish between the restoration of sentence credits, which was barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and other forms of relief for the sentence credit deprivation, like damages, that could go forward. *See Wolff*, 418 U.S. at 554-55. The damages claims that *Wolff* permitted to go forward could only be decided by determining whether the credits had been constitutionally deprived.[1] *Id.* at 555.

THERE IS NO CLAIM FOR INJUNCTIVE RELIEF AFFECTING THE DURATION OF YOUNG'S SENTENCE; EVEN IF THERE WERE, IT WOULD BE IRRELEVANT TO THE ISSUE PRESENTED FOR CERTIORARI

The respondents contend that Young has a claim remaining for injunctive relief that would require the State to apply jail-time credits to reduce Young's sentence. The contention is embroidered by the insistent accusation that Young's counsel have misrepresented the relief requested by Young's pro se complaint.[2] This is a red herring. There was no misrepresentation; furthermore, even if a claim for injunctive relief remained it would be absolutely irrelevant to the issue on which certiorari is sought.

Young has been incarcerated, paroled, and then reincarcerated on the same sentence. His initial complaint did seek both damages for the lengthened confinement caused by denial of his jail-time credits during his *prior* term of

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[1] In asserting that *Wolff* authorized damages only for claims relating to conditions of confinement, the respondents simply ignore the Court's statement, in the very language they quote (Opposition at 5), that damages claims arising from the unconstitutional denial of sentence credits could be pursued "*along with* suits challenging the conditions of confinement." *Wolff*, 418 U.S. at 554 (emphasis added).

[2] Young, an indigent prisoner, proceeded pro se in the district court and the Ninth Circuit until the time of the Ninth Circuit's first opinion. Wiebe's pro bono representation of Young began with the Ninth Circuit petition for rehearing and continues in this Court.

incarceration and injunctive relief that would compel the State to apply his jail-time credits to his *current* term of incarceration. CR 2 at 3-4 (Requests for Relief Nos. 1, 2, & 3). As the respondents admit, Young amended his complaint to drop this prayer for relief. CR 9a, 22. Contrary to the respondents, however, after the amendment there was no remaining request for "[p]rospective injunctive relief to preclude the [Indeterminate Sentence Review Board (ISRB)] from denying him jail credits." Opposition to Certiorari at 3.

The respondents' confusion apparently arises from their new counsel's misreading of the complaint's fifth prayer for relief. In it, Young asked the district court to protect its jurisdiction over his damages claim by preventing the ISRB from absolving the respondents of liability. Specifically, he sought to bar the ISRB from retroactively extending his long-past release date on his *prior*, expired term of incarceration (i.e., the one for which he seeks damages), and increasing it by the amount of the jail-time credits he had been denied.[3/] Young feared that the effect of such an *ex post facto* extension of his prior term would be that, once his jail-time credits were properly applied to that prior term, his proper release date for his prior term would become the date on which he was actually released and his damages would be nil. In his fifth prayer, Young sought no relief affecting the duration of his *current* term of confinement.

Young's subsequent pro se pleadings in both the district court and the Ninth Circuit made clear that he was not requesting *any* relief, injunctive or otherwise, that would require the State to apply his jail-time credits to his current term of

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[3/] Young set forth this request in his complaint thus: "(5) Issue a restraining order directed at the Indeterminate Sentence Review Board, to prevent them from increasing my minimum term so they can apply my jail time credit to it and thereby absolve the other members [i.e., respondents Kenny and Manning] and Mr. Rose from liability." CR 2 at 4.

incarceration or otherwise result in his immediate or speedier release.[4/] Before their Opposition to Certiorari, the respondents had conceded that Young was not requesting injunctive relief restoring his sentence credits and that all that remained was his damages claim.[5/] Consequently, it was the issue of whether section 1983 damages claim must be exhausted that was actually litigated by the parties and decided by the district court and the Ninth Circuit.[6/] *See, e.g.*, CR 50 (Magistrate's Report and Recommendation) at 3.

Moreover, even if a claim for injunctive relief were present, it would be absolutely irrelevant to the only issue presented by the petition for certiorari: whether Young's section 1983 damages claims must be exhausted. The Court has made clear that damages claims may properly go forward even when joined with requests for other forms of relief which are barred by the exhaustion requirement. *Wolff*, 418 U.S. at 554-

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[4/] *See, e.g.*, the following pleadings of Young: CR 44 at 1 ("Plaintiff has stated a number of times already that he is not seeking an immediate or speedier release . . . . Plaintiff has specifically requested an award for compensatory relief for damages . . . ."), 14 ("That leaves Plaintiff with percisely [sic] what he has prayed for in his Civil Rights Complaint; an award for damages."); Appellant's Ninth Circuit Reply Brief ("Transverse") at 10 ("Plaintiff has consistantly [sic] indictated [sic] to the Court that he seeks neither immediate or speedier release.").

[5/] *See, e.g.*, the following pleadings of respondents: CR 20 at 1 ("Plaintiff is asking this court to find that he has been illegally incarcerated and then award monetary damages. Plaintiff had also originally asked this court to apply day for day jail time credit against his maximum term but . . . filed an amendment to his pleadings striking that portion of the requested relief."), 6 ("plaintiff has stricken that portion of his complaint requesting credit off his maximum term"); CR 30 at 2 ("although plaintiff has amended his complaint striking that portion requesting day for day credit against his maximum term, he has not struck and is still asking this court to award monetary damages"); CR 34 at 1 ("Plaintiff Young has filed this complaint pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. He is asking this Court to find that he has been illegally incarcerated and then award monetary damages."); Appellees' Ninth Circuit Brief at 5 ("Appellant does not specifically request immediate release or a speedier release").

[6/] Nor did the Ninth Circuit, in either its initial or its amended opinions, conclude from its independent review of the record that any claim for injunctive relief remained.

55 (holding that claims for damages, declaratory relief, and prospective injunctive relief short of actual restoration of withheld sentence credits should go forward even though joined with claims for injunctive relief ordering immediate or speedier release of the type barred by *Preiser*). Thus, the question of whether Young's damages claim must be exhausted would not be answered or eliminated if he had also requested other forms of relief subject to the exhaustion requirement.[7/]

RESPONDENTS' SUGGESTION OF MOOTNESS IS MERITLESS

In a radical reversal of position, the respondents assert that, because the ISRB credited 255 days against Young's maximum term, no factual basis has *ever* existed for either the district court or the Ninth Circuit to have stayed Young's section 1983 damages action on exhaustion grounds, and that the action should now go forward without further recourse to state proceedings.[8/] On this basis they argue that his petition is moot. In addition to being inconsistent with their prior representations,[9/] the

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[7/] Nor, contrary to the Opposition to Certiorari at 10, would the existence of other requests for relief that must be stayed until exhausted alter the collateral estoppel analysis presented in the petition for certiorari or raise any issue of federal-state comity. The respondents do not dispute that Young's damages claim is against them individually. As the Ninth Circuit recognized, Certiorari Petition App. A at 4a, if the damages claim goes forward, any resulting judgment against the respondents would not bind the State.

[8/] Because the respondents are sued in their individual capacity, they cannot concede exhaustion on behalf of the State, a non-party.

[9/] The respondents previously represented to both the district court and the Ninth Circuit that, despite the ISRB's action, Young had not exhausted his remedies and argued vigorously in both courts that Young should not be allowed to proceed with his section 1983 action until after he returns to state court and exhausts his remedies. *See* the following pleadings of the respondents: CR 20 at 3 & 6 (informing district court of ISRB's action crediting Young's maximum term with 255 days); CR 30 at 5 ("state judicial remedies remain available and plaintiff's failure to exhaust cannot be excused"), 7 ("he has failed to exhaust his available state remedies") ("Since plaintiff has failed to

(continued...)

respondents' argument is erroneous.

The respondents, while acknowledging that Young's section 1983 action is not moot, first postulate that the only relief that Young would be entitled to in a habeas corpus action based on the State's denial of his jail-time credits is the relief that the ISRB has already granted him, and then assert on this basis that the Ninth Circuit's decision staying his action pending exhaustion is moot. To the contrary, Young has never agreed that the State has properly applied his jail-time credits to his current term of incarceration or to his parole eligibility for his current term of confinement.[10] *See*

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[9](...continued)
present this issue to the Washington State court's [sic] first, this petition should be dismissed for failing to exhaust state remedies."); Appellees' Ninth Circuit Brief at 7-8 ("Since there was no factual demonstration that Appellant had exhausted his state remedies, the trial court correctly concluded that the federal complaint must be dismissed for failure to exhaust.").

[10] The ISRB undercounted the number of days of jail-time credit to which Young is entitled. *See* CR 48 at 2, 5. The ISRB has also failed to meaningfully apply any of his jail-time credits to advance his minimum term release date--the date set by the ISRB for his release from his *current* term of confinement. *See State v. Phelan*, 100 Wash.2d 508, 512-18, 671 P.2d 1212 (1983). Young's parole was revoked April 10, 1987. The ISRB set his release date as October 5, 1987, and set his "good-time" release date (i.e., the date on which he would be released if he earned his maximum amount of good time on his current incarceration) as August 5, 1987. *Respondents' Memorandum in Support of Motion to Dismiss*, CR 20, Ex. 10. Both dates passed without Young's release or any further action by the ISRB to extend his release date.

Instead, on January 14, 1988, the ISRB, at the same time it was applying 255 days of jail-time credit to his maximum term, applied a portion of those 255 days to his minimum term to retroactively move his scheduled release date back to April 7, 1987; i.e., *it scheduled his release date for three days before his parole was revoked and his current incarceration began. Id.*

This strange action, by whose logic Young should never have been reincarcerated in the first place, has been of no practical benefit to him, however. He remains incarcerated today, three years and nine months after his scheduled release date. His continuing confinement beyond his release date without a hearing and a showing of some cause for his continued imprisonment and with no determination of a new release date is itself a due process violation. *See Bergen v. Spaulding*, 881 F.2d 719, (continued...)

CR 48 at 2, 5. Thus, the respondents' argument that this petition is moot because they have unilaterally decided, without any state or federal judicial determination, that the ISRB's action is the only relief to which Young is entitled must be rejected.

CONCLUSION

The writ of certiorari should be granted.

DATED: January 6, 1991

Respectfully submitted,

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[10/](...continued)
721 (9th Cir. 1989).

By asking the Court to dismiss the petition for certiorari as moot, the respondents would have the Court ratify the State's continuing constitutional violation in failing to properly apply Young's jail-time credits to his current term of incarceration.

No. 90-5854

In The

Supreme Court of the United States

October Term, 1990

ROBERT H. YOUNG,

Petitioner,

v.

PHYLLIS KENNY, THOMAS MANNING, and HENRY ROSE,

Respondents.

CERTIFICATE OF SERVICE

I, Richard R. Wiebe, a member of the Bar of this Court and Counsel of Record for petitioner Robert H. Young, hereby certify that, pursuant to Rule 29.3, on January 6, 1991, three copies of petitioner's Reply Brief in Support of Petition for Certiorari were deposited for mailing, first class postage prepaid, to

Kathleen D. Mix
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Office of the Attorney General
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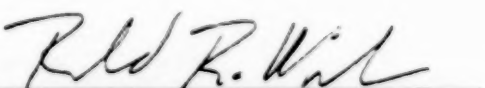
who is counsel of record for respondents. I further certify that all parties required to be served have been served.



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SUPREME COURT OF THE UNITED STATES

RICK DEAN BRESSMAN ET AL.

90-5672 *v.*

HAL FARRIER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT H. YOUNG

90-5854 *v.*

PHYLLIS KENNY ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 90-5672 AND 90-5854. Decided February 25, 1991

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting from the denial of certiorari.

These petitions raise the questions whether the exhaustion requirement of 28 U. S. C. § 2254 applies when state prisoners, in a suit under 42 U. S. C. § 1983, challenge the duration or conditions of their confinement but seek only damages or declaratory relief. The Eighth Circuit held here that exhaustion is required for § 1983 actions which include challenges to the conditions, as well as to the length or duration, of confinement. 900 F. 2d 1305, 1308 (1990). See also *Offet* v. *Solem*, 823 F. 2d 1256 (CA8 1987). The Seventh Circuit has adopted the contrary position. See *Viens* v. *Daniels*, 871 F. 2d 1328, 1333-1334 (1989). The Ninth Circuit held here that exhaustion is required for § 1983 actions seeking damages, so long as the requested relief requires as its predicate a determination that a prisoner's sentence is invalid or unconstitutionally long. 907 F. 2d 874, 876 (1990). Although no Court of Appeals has held to the contrary, several have recognized the apparent tension between this position

and the decisions of this Court in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), and *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). See, *e. g.*, 907 F. 2d, at 877; *Viens*, *supra*, at 1333; *Gwin* v. *Snow*, 870 F. 2d 616, 623 (CA11 1989).

Because of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented, I would grant certiorari in these two cases.